85-1413

Supreme Court, U.S.
FILED
FEB 21 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1750

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1985

GEORGE MARCANTONIO,

Petitioner,

VS

UNITED STATES OF AMERICA,

Respondent,

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTION PRESENTED

Was the petitioner deprived the right to due process of law by the introduction of irrelevant, prejudicial testimony concerning the amount of his gross income for 1979?

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UNITED STATES OF AMERICA,

RESPONDENT,

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TO THE UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

Petitioner, George Marcantonio, by Harvey J. Goldstein, his attorney, respectfully prays that the Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on October 23, 1985.

OPINION BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is unreported. A copy of the opinion appears in the Appendix at App. p. 1.

JURISDICTION

The judgment of the United States Court of Appeals was entered on October 23, 1985. This Petition for a Writ of Certiorari has been filed within sixty (60) days after the entry of the United States Court of Appeals' judgment as required by Rule 20.1, Rules of the Supreme Court of the United States.

Jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1.)

STATUTORY AND CONSTITUTIONAL PROVISIONS

Constitution of the United States

Fifth Amendment

No person shall . . . be deprived of life, liberty, or property, without due process of law . . .

Rule 403

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

STATEMENT OF THE CASE

Defendant failed to file his income tax returns for 1976, 1977, and 1978. Sometime in 1979, defendant was contacted by a revenue agent of the Internal Revenue Service with respect to his failure to file. Defendant retained an accountant to assist him in preparing the returns and also for 1979. Defendant subsequently filed returns for 1976 through 1978 in August, although for one year there was a negative gross income, but never did file a return for 1979. Defendant was charged by information on June 25, 1984 with one count of failing to file his

1979 income tax return.

Prior to trial defendant offered to stipulate to the following elements of the offense: 1) Defendant was required to file a return for 1979; 2) Defendant knew he was required to file a return for 1979; and, 3) Defendant failed to file a return for 1979. Defendant proposed to try only the issue of whether his failure to file was willful. The government rejected his proposal.

On January 18, 1985 defendant filed a motion in limine, asking the court to preclude the government from introducing evidence of gross income in 1979 on the basis of relevance, in light of the fact that the only issue was willfulness. On February 13, 1985 the trial court denied defendant's motion. On May 1, 1985 defendant filed a Petition for a Writ of Mandamus with the United States Court of Appeals for the Seventh Circuit seeking a stay

of the trial and a review of the trial court order. On March 4, 1985 the petition was denied.

On March 8, 1985 the defendant was convicted of the offense charged in the information, and on April 23, 1985 defendant was sentenced to 90 days incarceration, and fined $5,000.00, which was stayed pending appeal. On April 30, 1985 defendant filed a notice of appeal.

On October 23, 1985 the United States Court of Appeals for the Seventh Circuit affirmed the judgment of conviction rendered by the District Court.

REASONS RELIED ON FOR ALLOWANCE OF WRIT

"Due process of law" requires fundamental fairness in the proceedings. In re Winship, 397 U.S. 358, 90 S. Ct. 1068 (1970). When evidence introduced is irrelevant, and so prejudicial as to make it likely that the defendant cannot obtain a fair trial, the defendant's

guarantee of due process of law is violated.

In order to establish that a person is guilty of a crime, the government must establish the existence of each element of the offense beyond a reasonable doubt. In re Winship, supra. There are four separate elements of the offense of failure to file an income tax return: 1) The defendant was required to file a return; 2) The defendant knew he was required to file a return; and, 3) The defendant failed to file a return; and, 4) The defendant's failure to file a return was willful. U.S. vs. Walker (1973, CA 9 Wash.) 479 F. 2d 407; U.S. vs. Klein (1977, SD NY) 438 F. Supp. 485.

Prior to trial, defendant offered to stipulate to the first three elements of the offense, but to try the fourth. The government rejected this approach, but chose instead to introduce evidence

of a specific amount of gross income for 1979 over defendant's objection. It is defendant's position that any amount of income over the minimum amount necessary to trigger the filing requirement is irrelevant and prejudicial in light of the proposed stipulation, and its admission should have been precluded by Rule 403, Fed. Rules of Evidence.

In order to determine whether the evidence introduced at trial is relevant, each element should be considered separately. The evidence is obviously relevant to prove the first element--requirement to file; however, the only fact that the government need prove to establish the first element is whether defendant earned $5,400.00 in the year in which he failed to file. Any amount over and above $5,400.00 is irrelevant to the establishment of this

element. Defendant offered to stipulate to this element, so the proof of it should have been excluded as a waste of time, and irrelevant and prejudicial to the issue contested.

The evidence is obviously relevant to prove the second element of the offense--knowledge of the requirement to file. Admittedly, one who earns $1,089,000.00 in one year has a harder time claiming with any credibility to lack of the knowledge of the requirement to file than one who earns $5,400.00; however, defendant offered to stipulate to this element. Had the government accepted this proposal, the introduction of this evidence would have been precluded as a waste of time and irrelevant to the issue contested.

The evidence has no relevance to prove the third element of the

offense--failure to file. Further, it has no relevance to prove the fourth element--willfulness. Gross income has no direct relationship to the amount of the tax owed by the taxpayer, and is not probative to determine the defendant's state of mind. The evidence, while not relevant, is prejudicial.

> "Because the facts indicated Walker's gross income for both years exceeded the statutory minimum, the prosecution had already proved that he was required to file returns--therefore, this evidence was unnecessary to show the duty to file.
>
> The admission of this evidence would have a definite tendency to prejudice a jury in a failure to file case where the defense

> is a lack of knowledge of the need to file. When there is no legitimate basis for admissibility and the prejudice is such that the defendant could not receive a fair trial, a reversal is required."
>
> U.S. vs. Walker supra 408-409.

On March 5, 1985, the defendant entered into a stipulation with the government for the introduction of the income evidence, but is so doing did not waive his objection to the admissibility of that evidence. The government introduced other evidence of income in addition to the stipulation.

There exists another reason for reversing the judgment to the Court of Appeals. Upon defendant's offering to stipulate to the existence of an element of the offense, evidence necessary to prove the existence of that element becomes

irrelevant. Even if prior to the offer that evidence was relevant, and outweighed the prejudice, after the offer to stipulate, the prejudice outweighed the relevance.

By allowing the government to reject the stipulation, the government is given the power to reject a stipulation to the existence of an element of an offense in order to make irrelevant prejudicial evidence relevant, thus enabling the government to introduce prejudicial evidence which would have been inadmissible had the stipulation been accepted.

CONCLUSION

Based upon the foregoing argument, it is respectfully requested that this Court issue a Writ of Certiorari to review the judgment and the opinion of the United States Court of Appeals for the Seventh Circuit.

Dated at Milwaukee, Wisconsin, this 20th day of December, 1985.

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APPENDIX

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United States Court of Appeals

For the Seventh Circuit

Chicago, Illinois 60604

Submitted October 9, 1985*

October 23, 1985.

Before

Hon. RICHARD D. CUDAHY, Circuit Judge

Hon. JESSE E. ESCHBACH, Circuit Judge

Hon. WILBUR F. PELL, JR., Senior Circuit Judge

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

No. 85-1750 vs.

GEORGE MARCANTONIO
Defendant-Appellant.

Appeal from the United States District Court for the Eastern District of Wisconsin
No. 84-CR-89,
Hon. Terence T. Evans
Judge.

ORDER

Defendant, George Marcantonio, was charged with willful failure to file a federal income tax return for 1979 in violation of 26 U.S.C.§7203. He was

convicted by a jury and was sentenced to ninety days' imprisonment and fined $5,000. Defendant appeals, challenging the district court's denial of his motion in limine and challenging the court's jury instruction on the issue of willfulness. We affirm.

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* After the preliminary examination of the briefs, the court notified the parties that it had tentatively concluded that oral argument would not be helpful to the court in this case. The notice provided that any party might file a "Statement as to Need of Oral Argument." See Rule 34(a), Fed. R. App. P.; Circuit Rule 14(f). No such statement having been filed, the appeal has been submitted on the briefs and record.

I.

Marcantonio was charged with one count of willful failure to file his 1979

income tax return. Prior to trial, defendant offered to stipulate to three elements of the crime of willful failure to file and income tax return: (1) that he knew he was required to file an income tax return for 1979; (2) that he knew he was required to file a return for 1979, and (3) that he did not file a return for 1979. Defendant offered to try only the fourth element of the crime: whether his failure to file was willful. The government rejected this proposed stipulation.

On January 18, 1985 defendant filed a motion in limine, seeking an order excluding evidence of the amount of gross income he received for 1979. Defendant objected to this evidence on the basis of relevance since the only issue remaining to be tried was willfulness. The district court denied the motion. Defendant then filed a petition for a writ of mandamus with this court seeking a stay on the

trial and a review of the trial court order. The petition was denied.

On the day of the trial, defendant stipulated to the introduction of evidence by the government concerning his 1979 income, subject to his objection to the admission of that evidence and without admitting the evidence was true or accurate. Defendant was granted a standing objection to the evidence on relevancy and materiality grounds. The stipulation specified that the government would have introduced evidence that defendant's gross income in 1979 was $1, 086,876.23. The trial commenced and both the government and defendant submitted proposed jury instructions defining "willful" as an element of the offense. The district court rejected defendant's instruction in favor of the government's. We agree with the district court's instruction.

II.

Defendant contends that the district

court committed prejudicial error when it denied his motion in limine to exclude evidence of the amount of income he received in 1979. Defendant argues because he was willing to stipulate that he had made enough income in 1979 to be required to file a return, that evidence of actual income was irrelevant and prejudicial. The government, on the other hand, contends that evidence of defendant's actual income was probative as to the element of willfulness.

This court has recently examined the admissability of income evidence where that defendant was willing to stipulate to the fact he made sufficient income to require the filing of a return. United States v. Green, 757 F. 2d 116 (7th Cir. 1985). In Green, we determined that evidence of actual income was "properly received into evidence as it related to the issue of the defendant's intent or willfulness'

in failing to file a return. . ." Id. at 119. The higher the amount of actual income the more probable the failure to file was willful, rather than inadvertent or mistaken. Thus, the evidnece was properly admitted.

III.

Defendant also argues that the district court erred in refusing to instruct the jury that in order for a violation of Section 7203 to be willful the violation must be the product of a "bad purpose or evil intent." Instead the district court instructed the jury that "[a]n act is done under the law willfuly if it is done voluntarily and intentionally with the purpose of avoiding a known legal duty." Defendant's contention is incorrect. In United States v. Pomponio, 429 U.S. 10 (1976), the Court held, in a prosecution for willfully filing false income tax returns under 26 U.S.C.§7206(1), that

the proper definition of willfulness is a "voluntary intentional violation of a known legal duty." Id. at 12. An additional instruction on good faith is not needed. Id. at 12-13. "Willfulness" has the same meaning for purposes of both section 7203 (the statute involved here) and section 7206. United States v. Bishop, 412 U.S. 346, 359-60 (1973).

This court has consistently approved the Pomponio instruction on willfulness in section 7203 cases. Recently, we have pointed out that since the Supreme Court's decision in Pomonio and our decision in United States v. Moore, 627 F.2d 830 (7th Cir. 1980), cert. denied, 450 U.S. 916 (1981), "the 'bad faith' instruction, which the defendant. . .proposes, need not be given by the district court." Green, 757 F.2d at 123. See also United States v. Latham, 754 F.2d 747, 750 (7th Cir. 1985); United States v. Koliboski, 732

F.2d 1328, 1331 (7th Cir. 1984); United States v. Verkuilen, 690 F.2d 648, 655 (7th Cir. 1982); United States v. Moore, 627 F.2d 830, 833 (7th Cir. 1980), cert. denied, 450 U.S. 916 (1981); United States v. Sawyer, 607 F.2d 1190, 1192 (7th Cir. 1979) cert. denied, 445 U.S. 943 (1980). The district court's instruction here was in accord with a long line of our cases.

The decision of the district court is

AFFIRMED.